facilities for the discovery of gaming houses and increased facilities for the prosecution of offences connected with gaming houses.

The last part of the section has not been founded on, but in my opinion it increases the difficulty of the construction which your Lordships have accepted. It is this—"And every person found within such premises without lawful excuse shall be liable in a penalty not exceeding £10." It appears to me that under the interpretation which has been put upon the section the same person who has already been fined once or twice the statutory maximum penalty of £50 may be liable for this penalty also.

On the whole matter the view I take is that only one offence is dealt with, which may be committed in a number of different ways, and that the offender under the section is therefore liable to only one penalty. That view, I think, is contrary to the view accepted by the Court in the case of *M'Culloch* v. *Rae* (1915 S.C. (J.) 43, 7 Adam 602), and if it is, then I do not hesitate to say that I disagree with the view taken in *M'Culloch's* case.

Another question has been raised in this case upon which I desire to reserve my opinion. It is this—It is said that if there are more than two offences committed and there is provision for only one penalty, you can impose the whole penalty in respect of each of these offences. Whether or not that is so I do not desire to express any opinion. The matter has not been fully argued before us, and I can see that the Legislature may have specified a number of offences which a man can commit at the same time, and yet say that the penalty he is to be subjected to is a certain sum as maximum and no more.

LORD ANDERSON—There is no doubt that a penal statute ought to make it quite clear as to whether the specific acts it prohibits are alternative modes of committing a single offence, or are distinct and separate offences. In the former case no more than one penalty can be exacted; in the latter a penalty may be imposed for each distinct offence. I was at first inclined to take the view which Lord Hunter has expressed and to regard the section as enumerating a number of modes in which the general offence of what I may term "running" a gaming house might be committed. On further consideration, however, I am satisfied that the Legislature intended to penalise distinct offences, and not merely to prohibit the commission of one offence. If this be so, the penalty provided may be imposed in respect of each of these separate offences. I am unable to follow the suggestion that as there was only one offender there could only be one penalty. In my opinion, if the same individual commits two separate offences, he may be punished in respect of each by way of separate penalty. The two offences charged were, in my opinion, made distinct offences by the statute, and it is not disputed that there was evidence on which the Magistrate was entitled to convict the appellant of each of these distinct offences.

I therefore think the first question of law should be answered in the affirmative. The second question not being properly expressed ought not to be answered.

The Court answered the first question in the affirmative, and with regard to the second question found that the Magistrate was entitled to fine Healy in respect of each separate offence found proved.

Counsel for the Appellants — Christie — Gilchrist. Agents—Mason & Turner Macfarlane, W.S.

Counsel for the Respondent — Fleming, K.C.—Keith. Agents — John C. Brodie & Sons.

COURT OF SESSION.

Friday, November 10.

FIRST DIVISION.

[Sheriff Court at Linlithgow.

BRESLIN *v.* BARR & THORNTON, LIMITED.

Workmen's Compensation — Expenses — Discretion of Arbitrator — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (7).

An arbitrator in an arbitration under the Workmen's Compensation Act 1906 has an unfettered discretion in the matter of the expenses of the arbitration provided that he exercises that discretion judicially and legally.

Circumstances in which the Court *held* that an arbitrator, there being no facts set forth in the Stated Case justifying the inference that he had failed to exercise his unfettered discretion judicially and legally, was entitled to find no expenses due to or by either party.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule (7), enacts — "The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . arbitrator."

In an arbitration under the Workmen's Compensation Act 1906 Andrew Breslin, miner, Shotts Road, Fauldhouse, *appellant*, claimed compensation from Barr & Thornton, Limited, coalmasters, 135 St Vincent Street, Glasgow, *respondents*, in respect of injuries sustained by him in an accident arising out of and in the course of his employment on 8th April 1920. Previous to the arbitration the respondents had paid the appellant compensation in respect of total incapacity down to 14th October 1921, when payment of compensation ceased.

On 9th February 1922 the Sheriff-Substitute (J. A. T. ROBERTSON) awarded compensation in respect of total incapacity at the rate of £1 per week from 14th October 1921 to 9th February 1922, and in respect of partial incapacity at the rate of £1 per week from 9th February 1922 until the further orders of the Court, and found no expenses

due to or by either party, and at the request of the appellant stated a Case for appeal on the question of expenses.

The Case stated:—"I found in fact—1. That on 8th April 1920 the appellant was injured by an accident arising out of and in the course of his employment with the respondents at their Knowton Colliery, Fauldhouse. 2. That he was totally incapacitated thereby. 3. That he was paid by the respondents compensation in respect of the said total incapacity under the Workmen's Compensation Act 1906 down to and for the week ending 14th October 1921. 4. That his total incapacity had ceased at 9th February 1922, and he was then fit for light work. I found it not proved that the appellant's total incapacity had ceased at 14th October 1921, or at any date prior to 9th February 1922. I awarded compensation under the said Act to the appellant in respect of his total incapacity at the rate of £1 per week from 14th October 1921 to 9th February 1922, and in respect of partial incapacity at the rate of £1 per week from 9th February 1922 until further orders of Court. With regard to expenses, I treated the case as one of divided success, and found no expenses due to or by either party. I did so upon the following grounds:—On the one hand the respondents maintained that the appellant's total incapacity ceased at 14th October 1921, but they admitted that he was still partially incapacitated at the date of the proof, and consented to a continuing award of compensation in respect of the said partial incapacity at the maximum rate permitted by the Workmen's Compensation Act. On the other hand the appellant maintained that he was still totally incapacitated at the date of the proof, and that he required further medical treatment to fit him for any form of work, and he claimed an award of compensation in respect of the said total incapacity to be continued until the further orders of the Court."

The *questions of law* were—"1. In the circumstances set forth was it within my discretion to find no expenses due to or by either party? 2. Was I bound to award to the appellant?"

In his note (which was not printed in the Case) the arbitrator justified his finding of no expense due to or by either party on the ground that the case was one of divided success.

Argued for the appellant—The respondents having stopped payment of compensation, the appellant was entitled to present this application, without which he would have got nothing. Although he had not succeeded in obtaining all he claimed, he had got something, and accordingly the arbitrator was in the circumstances not entitled in the exercise of his judicial discretion to deprive him of the usual rights in the matter of expenses of an even partially successful pursuer. Counsel referred to the following cases:—*Mikuta* v. *William Baird & Company*, 1916 S.C. 194, 53 S.L.R. 160; *Fife Coal Company* v. *Feeney*, 1918 S.C. 197, 55 S.L.R. 223; *Fauns Coal Company* v. *Murphy*, 1918 S.C. 659, 55 S.L.R. 557; *William Baird & Company* v. *Murphy*, 1921 S.C. 891, 58 S.L.R. 611.

Counsel for the respondents were not called upon.

LORD PRESIDENT—The dispute before the learned arbitrator was concerned, first, with the question of the duration of the workman's total incapacity, and secondly, with the question whether if no longer totally incapacitated he still suffered from partial incapacity. The employers had paid compensation as for total incapacity down to 14th October 1921, but they had paid nothing from that time until the proceedings before the arbitrator took place. The result of the inquiry was that the learned arbitrator took the view that the workman's total incapacity had not ceased on 14th October 1921, but that although it might be difficult to fix the precise date at which it did cease, it had done so at anyrate by the date of the proof on 9th February 1922.

The workman's contention was that total incapacity had been continuous from the date of the accident and still continued at the date of the proof, but, as was explained to us, he ultimately expressed his willingness to accept light work, which, of course, meant that in claiming as for total incapacity he was putting his case too high. The employers on the other hand ultimately admitted that there was partial incapacity at the date of the proof.

The arbitrator accordingly made an award as for total incapacity down to 9th February 1922, and as for partial incapacity thereafter, but found no expenses due to or by either party; and the question put to us is whether in the circumstances which I have described it was within the arbitrator's discretion so to find, or whether he was bound to award expenses to the workman.

Under paragraph 7 of the Second Schedule to the Workmen's Compensation Act 1906 the costs of and incidental to the arbitration and proceedings connected therewith are directed to be in the discretion of the arbitrator subject to rules of Court. The discretion thus given to the arbitrator with regard to expenses is unqualified by anything in Book L, chap. xiii, of the Codifying Act of Sederunt 1913. The only provision which deals with expenses is section 10, which merely provides that the costs of all proceedings under the Act shall not exceed the limits prescribed by the Act of Sederunt, and that the regulations and table of fees therein contained shall be held to apply to such proceedings. In other words, the Act of Sederunt leaves the discretion of the arbitrator unqualified.

Now that discretion is of course a judicial discretion—a discretion, that is to say, which must be exercised judicially and legally. Accordingly if the arbitrator's decision on the matter of expenses has been arrived at as the result of some error in law, for example, owing to his having misconstrued a tender made by the employers as happened in one of the cases cited, his discretion could not be said to have been exercised judicially, and he could be put right by this Court. Again, if it could be shown that

in any particular case the arbitrator, instead of applying his mind fairly to the circumstances of the case before him, directed himself (as it were) that the question of expenses was governed by some supposed rule of law in favour either of the employer or of the workman, or some hard-and-fast principle which he evolved for himself, there would, I apprehend, be no doubt that his discretion would not have been exercised judicially, and his finding in regard to expenses could be successfully assailed.

But there is nothing of that sort disclosed in the present case. It was argued that very possibly, according to the general practice of this Court, the question of expenses might have been determined differently from the way in which the learned arbitrator disposed of it. But an arbitrator is not bound by the rules of practice which prevail in the Court of Session in a matter of this kind. On the contrary, the question of expenses is entirely in his discretion, provided, as I have said, he makes no mistake in law and honestly applies his mind to what he thinks would be fair and appropriate in the circumstances of the particular case before him. It was said that in the present case the workman's application was justified. So it was. He would have got nothing if he had not presented his application, and the argument was that having succeeded in getting something he was entitled to his expenses. On the other hand it is the case that the workman's claim was pled too high, and we do not know the history of the proceedings, or how far the expenses actually incurred were really incurred owing to the excessive claim which the workman made, and persisted in until the final stage of those proceedings was reached. In these circumstances I am quite unable to say that the learned arbitrator failed to exercise his unfettered discretion judicially and legally, even though his decision may not accord with the result which would probably have been reached in a similar case according to the usual practice of this Court. I am therefore for answering the first question put to us in the affirmative and the second question in the negative.

LORD SKERRINGTON — We were not referred to any finding of fact in the Stated Case justifying the inference that there were no materials before the arbitrator which entitled him to exercise a discretion in regard to expenses, and that he was therefore under a duty to award expenses to the appellant. Another way of stating the same proposition is to say that there are no findings in the Stated Case which entitle us to come to the conclusion that the arbitrator committed an error of law.

For these reasons I agree that the first question must be answered in the affirmative and the second in the negative.

LORD CULLEN—I am quite unable to see that in making the award of expenses which he did the arbitrator either failed to exercise judicially the discretion committed to him by paragraph 7 of the Second Schedule to the Act or committed any error in law. Accordingly I agree that the questions should be answered as your Lordships propose.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for Appellant—Maclaren, K.C.—Burnet. Agent—John Baird, Solicitor.

Counsel for Respondents — Carmont — Marshall. Agents—W. & J. Burness, W.S.

Tuesday, October 24.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

CORRIGAN *v.* MONAGHAN.

Reparation—Slander—Slander Consisting of Statement that Pursuer had had a Bastard Child—Averments by Defender Reflecting on Pursuer's Character—Averments of Specific Instances of Adultery—Admissibility — Relevancy of Defender's Averments in Mitigation of Damages.

In an action of damages for slander founded on an alleged statement by the defender that the pursuer had had a bastard child, *held* (1) that an averment in defence that the pursuer was well known in the neighbourhood in which she resided as a person of loose and immoral character and had suffered no damage as the result of the defender's statement was relevant; and (2) that averments of specific acts of adultery by pursuer at a date considerably later than the act alleged in the attack on her character fell to be deleted from the record; but (3) that these averments were sufficient notice to the pursuer to entitle the defender to cross-examine her as to the specific instances, although it was incompetent to lead substantive evidence in support of their truth.

Mrs Annie Dougan or Corrigan, wife of Edward Corrigan, raised an action against William Monaghan, in which she sought to recover £500 as damages for slander.

From the averments of the pursuer it appeared that she had not lived with her husband since 1904, when he left her and went to America. The slander complained of was an alleged statement by the defender on 1st December 1921 that the pursuer had had a child and that it was a bastard, being nine or ten years old.

In his defence the defender did not deny making the statement, but explained that it was made in the course of conversation with a man named William Docherty, and in reply to a question put to him by Docherty; that it was based upon a statement made by the pursuer; and that if it was untrue the pursuer had herself to blame. The defences also contained the averments quoted verbatim in the interlocutor of the Lord Ordinary.